TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~530~~ 30

FLOYD LINN RATHBUN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 31, 1956
CERTIORARI GRANTED JANUARY 14, 1957

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 538

FLOYD LINN RATHBUN, PETITIONER,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INDEX

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[fol. 1] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5314

FLOYD LINN RATHBUN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

STATEMENT OF POINTS RELIED UPON—Filed January 16, 1956

The appellant, Floyd Linn Rathbun, by his attorney Thomas K. Hudson, makes the following Statement of Points Relied Upon for reversal of the judgment and commitment against him entered by the *the* District Court of the United States, for the District of Colorado, on the 21st day of October, A.D. 1955, upon the verdict of the Jury finding said defendant guilty under Count I and guilty under Count II of the Indictment:

1. The Court erred in denying defendant's Motion to Dismiss Count I of the indictment for a fatal variance.
2. The Court erred in admitting the testimony of the witness Robert L. Maybers, to which objection was made.
3. The Court erred in admitting the testimony of the witness Herman R. Huskins, to which objection was made.
4. The Court erred in denying defendant's motion to strike the testimony of the witness Herman R. Huskins.
5. The Court erred in refusing to admit into evidence defendant's tendered Exhibit A.
6. The Court in refusing to admit into evidence defendant's tendered Exhibit B.
7. The Court erred in refusing to allow the defendant to offer rebuttal.

[fol. 2] 8. The Court erred in admitting into evidence the Government's Exhibit 2.

9. The Court erred in charging the jury and in refusing to charge the jury as requested.

10. The Court erred in failing to give witnesses excluded from the court room a cautionary instruction, although requested by the defendant.

Dated this 14th day of January, A.D. 1956.

Thomas K. Hudson.

[fol. 3] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Pleas and Proceedings before The Honorable William Lee Knous, Chief Judge, and The Honorable Jean S. Breitenstein, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

THE UNITED STATES OF AMERICA, Plaintiff,

v.

FLOYD LINN RATHBUN, Defendant.

No. 14,467, Criminal.

INDICTMENT. KNOWINGLY TRANSMITTING IN INTERSTATE COMMERCE A COMMUNICATION CONTAINING A THREAT TO INJURE. 18 USC 875 (b) (c).—Filed April 7, 1955

The Grand Jury charges:

That on or about March 17, 1955, at approximately 1:15 A.M., MST, the defendant, Floyd Linn Rathbun, knowingly, wilfully and with intent to extort from Everett Henry Sparks, a thing of value, to-wit: 100,000 shares of stock of Western Oil Fields, Inc., did transmit in interstate commerce from New York City, New York, to Pueblo, in the State and District of Colorado, a communication by telephone to the said Everett Henry Sparks, in which telephonic communication the defendant, Floyd Linn Rathbun did threaten to injure the person of and to kill the said Everett Henry Sparks, in violation of 18 USC 875 (b).

Count Two

The Grand Jury further charges:

That on or about March 17, 1955, at approximately 1:15 A.M., MST, the defendant, Floyd Linn Rathbun, did knowingly and wilfully transmit in interstate commerce [fol. 4] from New York City, New York, to Pueblo, in the State and District of Colorado, a communication by telephone to the said Everett Henry Sparks, in which telephonic communication the defendant, Floyd Linn Rathbun did threaten to injure the person of and to kill the said Everett Henry Sparks, in violation of 18 USC 875 (c).

A True Bill.

Earl C. Bartow, Foreman.

Donald E. Kelley, United States Attorney.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

ARRAIGNMENT AND PLEA—Entered April 15, 1955

On April 15, 1955, the United States of America appeared by James W. Heyer, Assistant United States Attorney, and the defendant Floyd Linn Rathbun appeared in person and by his counsel, Thomas K. Hudson, before the Honorable Jean S. Breitenstein, United States District Judge for the District of Colorado, and waived the reading of the Indictment and entered a plea of not guilty to counts 1 and 2 thereof; and it was Ordered that the defendant have twenty days in which to file Motions.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

VERDICT IN COUNT ONE—Filed September 14, 1955

We, the jury in the above entitled case, upon our oath do say, we find the defendant Floyd Linn Rathbun guilty as charged in count one of the indictment herein.

Floyd R. Murphy, Foreman.

[fol. 5] IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

VERDICT IN COUNT TWO—Filed September 14, 1955

We, the jury in the above entitled case, upon our oath do say, we find the defendant Floyd Linn Rathbun guilty as charged in count two of the indictment.

Floyd R. Murphy, Foreman.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JUDGMENT AND COMMITMENT—Entered October 21, 1955

On this 21st day of October, 1955 came the attorney for the government and the defendant appeared in person and by Thomas K. Hudson, his counsel

It Is Adjudged that the defendant has been convicted upon his plea of not guilty as to Counts #1 and #2, and a verdict of guilty as to Counts #1 and #2 of the offense of Knowingly transmitting in interstate commerce a communication containing a threat to injure, in violation of Title 18 U.S.C. Section 875 (b) (c) as charged in the Indictment herein and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of one (1) year and one (1) day upon each of Counts One and Two of the Indictment herein, from and after this 21st day of October, A.D. 1955.

It is further Adjudged by the Court that the terms of imprisonment imposed in each of Counts One and Two of the Indictment herein shall run concurrently.

It is further Adjudged by the Court that the defendant shall pay to the United States of America a fine of One

thousand dollars ($1,000.00) upon Count One of the Indict-
[fol. 6] ment herein, and that the defendant shall stand committed to a common jail until payment of said fine, or until he is otherwise discharged as provided by law.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

William Lee Knous, United States District Judge.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

MOTION FOR NEW TRIAL—Filed September 21, 1955

The defendant moves the Court to grant him a new trial for the following reasons:

1. The court erred in denying defendant's motion to dismiss Count I of the indictment for a fatal variance.
2. The verdict is contrary to the weight of the evidence.
3. The verdict is not supported by substantial evidence.
4. The court erred in admitting testimony of the witness Captain Maybers of the Pueblo Police Department to which objections were made.
5. The court erred in admitting testimony of the witness Sergeant Huskins of the Pueblo Police Department to which objections were made.
6. The court erred in denying defendant's motion to strike the testimony of the witness Sergeant Huskins of the Pueblo Police Department.
7. The court erred in admitting the testimony of Special Agent Moore of the Federal Bureau of Investigation, to which objections were made.
[fol. 7] 8. The court erred in admitting the testimony of Special Agent McClulloch of the Federal Bureau of Investigation, to which objections were made.
9. The court erred in admitting into evidence the Government's Exhibit 2.
10. The court erred in refusing to admit into evidence defendant's tendered Exhibit A.

11. The court erred in refusing to admit into evidence defendant's tendered Exhibit B.

12. The court erred in refusing to allow the defendant to offer sur-rebuttal.

13. The court erred in charging the jury and in refusing to charge the jury as requested.

14. The court erred in failing to give witnesses excluded from the courtroom a cautionary instruction, although requested by the defendant.

Dated this 19th day of September, A.D. 1955.

Thomas K. Hudson, Alice Loveland, Attorneys for defendant.

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

AMENDED NOTICE OF APPEAL—Filed October 27, 1955

Name and address of appellant: Floyd Linn Rathbun 607 San Mateo N.E. Albuquerque, New Mexico

Name and address of appellant's attorney: Thomas K. Hudson 613-616 Majestic Building Denver 2, Colorado

Offense: (Count One) That on or about March 17, 1955, at approximately 1:15 A.M., MST, the defendant, Floyd Linn Rathbun, knowingly, wilfully and with intent to extort from Everett Henry Sparks, a thing of value, to-wit: [fol. 8] 100,000 shares of stock of Western Oil Fields, Inc., did transmit in interstate commerce from New York City, New York, to Pueblo, in the State and District of Colorado, a communication by telephone to the said Everett Henry Sparks, in which telephonic communication the defendant, Floyd Linn Rathbun, did threaten to injure the person of and to kill the said Everett Henry Sparks, in violation of 18 USC 875 (b); and (Count Two) That on or about March 17, 1955, at approximately 1:15 A.M., MST, the defendant, Floyd Linn Rathbun, did knowingly and wilfully transmit in interstate commerce from New York City, New York, to Pueblo, in the State and District of Colorado, a communication by telephone to the said Everett Henry Sparks, in

which telephonic communication the defendant, Floyd Linn Rathbun, did threaten to injure the person of and to kill the said Everett Henry Sparks, in violation of 18 USC 875 (c).

Judgment on verdict finding defendant guilty on Count One and on Count Two; judgment entered September 14, A.D. 1955; Motion for New Trial denied October 4, A.D. 1955; sentence imposed on October 21, 1955, of imprisonment of one year and one day and a fine of one thousand dollars imposed.

Defendant is not now confined but is on bail.

I, the above-named appellant hereby appeal to the United States Court of Appeals for the Tenth Circuit from the above-stated judgment.

Dated this 24th day of October, A.D. 1955.

Thomas K. Hudson, Attorney for appellant.

[By order of November 17, 1955, the time for docketing the cause in the Court of Appeals was extended to January 10, 1956.]

[fol. 9] In United States District Court for the District of Colorado

Transcript of Trial Proceedings. (Excerpts).

Proceedings had before Honorable William Lee Knous, Judge of the United States District Court for the District of Colorado, and a jury, Courtroom A, Post Office Building, Denver, Colorado, on Monday, September 12, 1955, at 9:30 a.m.

Appearances:

James W. Heyer, Esq., Assistant United States Attorney, appearing for the Government. Thomas K. Hudson, Esq., Attorney at Law, 615 Majestic Building, Denver, Colorado; and Alice Loveland, Attorney at Law, 614 Majestic Building, Denver, Colorado; both appearing for the Defendant.

* * * * * * *

[fol. 10] EVERETT HENRY SPARKS, a witness called by the Government, testified as follows:

Direct examination.

By Mr. Heyer:

* * * * * * *

[fol. 19] Q. What did you do after your last conversation with the defendant on the 16th?

A. I called the police of Pueblo and told them that I would like——

Q. You don't have to relate what you told them, sir, just the fact you did call them.

A. I did.

Q. Were you contacted by the officers of the Police Department?

A. Yes, sir.

Q. Do you remember when?

A. Well, I'd say that they arrived at my home shortly before 1:00 o'clock.

Q. And that would have been on the morning of March 17th?

A. Yes, sir.

Q. And did you have any conversation with this defendant while the officers were there?

A. Yes, sir.

Q. Who made that call?

A. Mr. Rathbun called me collect, sir.

Q. About what time?

A. I would say shortly after 1:00, maybe 1:10 or 1:05.

Q. And did you have a conversation with the defendant?

A. Yes, sir.

Q. Where were the officers while you were having a conversation with the defendant?

A. Well, I went to the phone, and told them they could just as well listen to the call. I'd been conversing prior to that.

Q. Was this call to your home, sir?

A. Yes, sir.

Q. How many phones have you there?

A. I have three phones, sir—two separate lines.

Q. And where was the phone that the officers listened on?
A. In the dining room, joining the living room.

* * * * * * *

[fol. 34] ROBERT L. MAYBERS, a witness called by the Government, testified as follows:

Direct examination.

By Mr. Heyer:

Q. Will you state your name, sir?
A. Robert L. Maybers.
Q. And where do you live?
A. I live in Pueblo, 1344 East 34th Street.
Q. What is your occupation or business?
A. Police Officer, City of Pueblo.
Q. What is your rank?
A. Captain of Police.
Q. How long have you been with the Pueblo Police Department?
A. Since March, 1940.
Q. How long have you been Captain?
A. Since 1949.
Q. All right, sir. Were you on duty March 17 of 1955 in the early morning hours?
A. I was.
Q. Where were you performing your duties?
A. From the Captain's office in the Police Department, also cruising the city.
Q. Do you recall whether or not you had occasion to visit the residence of Mr. Sparks of Pueblo County?
A. I did.

OBJECTION TO ADMISSION OF TESTIMONY OF ROBERT L. MAYBERS

Mr. Hudson: If the Court please, at this time I desire to move that any testimony of Captain Nabor relative to the telephone conversation be excluded, and I should like to have an opportunity to argue the motion, your Honor.
[fol. 35] The Court: What's the basis? Under the Statutes or——

Mr. Hudson: Under Section 605.

The Court: Well, you may proceed with the examination up to that point, and I think at that time I'd like to hear counsel on it, and we will take it up in Chambers. But you can go ahead to that point.

Mr. Hudson: Thank you, your Honor.

Q. All right, sir. Did you answer the question, the last question?

A. I did.

Q. You did?

A. I had occasion to visit Mr. Sparks.

Q. What was the reason for your going to Mr. Sparks' residence?

A. I received a call from headquarters at 12:40 a.m. to contact Mr. Sparks by telephone concerning a problem that he had.

Q. Did you call him by telephone?

A. I did.

Q. Later did you go to his house?

A. I did.

Q. Were you alone or with someone else?

A. Sergeant Herman Huskins was with me at that time.

Q. Do you recall what time it was when you got there?

A. Not exactly, I imagine about 1:00 o'clock. It was 12:40 when we received the call. I called him, made another telephone call, then proceeded to his home from the central part of the city to his residence in the southwest part of the city.

Q. What did you do there?

A. I talked to Mr. Sparks in regards to the threat he had received.

Q. All right, and while you were there was there a telephone call that came through for Mr. Sparks?

Mr. Hudson: If the Court please——

The Court: Wait until he asks the question. The witness and Mr. Heyer both understand you are going to object to the question about the conversation. Up to now, nothing has been objectionable.

Q. How long after you had arrived at the Sparks' residence did the telephone call come through? A. About ten [fol. 36] minutes after we arrived.

Q. And what did you do when the phone rang?

A. When the phone rang, Officer Huskins and myself—Sergeant Huskins and myself—were placed on the extension in the dining room, I believe, of the residence, and we listened to the conversation.

Q. Did you know who was talking?

Mr. Hudson: Now, if the Court please, I object.

The Court: Re this conversation, I think this is a good place to stop right now, Mr. Heyer. Do you have any other witnesses that you wish to examine that have any bearing on it, involving this telephone conversation? Would you like to have that matter resolved now before we proceed?

Mr. Hudson: I'd like to have it resolved now.

* * * * * * *

[fol. 38] COURT'S OVERRULING OF OBJECTION

The Court: Well, I will rule that way. So the record here can show the objection will be overruled. I will announce to the jury that the objection is overruled.

Mr. Hudson: My exception will be noted.

The Court: Yes. Very well.

* * * * * * *

[fol. 39] HERMAN R. HUSKINS, a witness called by the Government, testified as follows:

Direct examination.

By Mr. Heyer:

Q. State your name, sir.
A. My name is Herman R. Huskins.
Q. Where do you live?
A. Pueblo, Colorado.
Q. What is the street address?
A. 2021 North Santa Fe Avenue.
Q. Are you married?
A. I am married.
Q. Do you have a family?
A. I have.

Q. What is your occupation or business?
A. I am a police sergeant.
Q. And that's with the Pueblo Police Department?
A. That's with the Pueblo Police Department.
Q. How long have you been connected with the Pueblo Police Department?
A. Almost ten years.
Q. All right, sir. Were you on duty in March of 1955?
A. I was.
Q. Do you recall where you were in the early morning hours of March 17, 1955?
A. I do.
Q. Where were you?
A. I, with Captain Nabor, was in *in* my patrol car.
[fol. 40] Q. Were you on duty about midnight and shortly thereafter?
A. I was.
Q. Did you have any occasion to visit the residence of Mr. Sparks of Pueblo?
A. I did.
Q. Do you recall what time you went there?
A. We received the call to make a phone call—for the Captain to call a certain number—about 12:45 in the morning.
Q. All right, sir. And what time did you arrive at Mr. Sparks' residence?
A. It should have been maybe twenty minutes or maybe a little bit later than twenty minutes after he made the phone call.
Q. When you arrived, did you and the Captain talk with Mr. Sparks?
A. We did.
Q. While you were there, was there a telephone call made to Mr. Sparks?
A. There was.
Q. Did you know what party was on the other end of the line?
A. I don't think that I knew at that time.
Q. Did you hear any of that conversation?
A. I did hear it.
Q. What were the circumstances of your overhearing the conversation?

A. The way it was that I heard it, this man on the other end of the line answered to the name of Floyd. That's the only way I have of knowing who it was on the other end of the line.

Q. How did you happen to overhear anything?

A. The phone range and Mr. Sparks had told us that he had received two——

Q. You are not allowed to tell us what Mr. Sparks told you unless it was during the conversation.

A. That was during our conversation with him in the investigation of this call.

Q. Yes, sir, but it was not in the presence of this defendant. So, if you will, state whether or not you were on the extension phone.

A. Yes, I was on the extension phone.

Q. Could you overhear the conversation?

A. Yes, sir.

Q. And what was the conversation in as much detail as you can recall?

A. The man answering to the name of Floyd was asking Mr. Sparks to release some stock—oil stock—and Mr. Sparks explained to him that he couldn't do it without authority from the Western Oil Company—or whatever [fol. 41] that was. I don't remember right off. But he told him, on the advice of his attorney, he couldn't release it, and the man on the other end of the line used several vile names and some profanity and he said, "I am going to take a plane as I can, and I am going to finish this thing for once and for all." Mr. Sparks said on the other—this line—he said, "What do you mean? Like some of the threats you have made to me in the past?" The other party stated, "You're damned right." He says, "I am going to kill you, and I don't care if you're making a recording of this conversation."

Q. All right, sir. Is that about all the conversation you can recall?

A. That's all it amounted to there.

Q. Do you know whether or not shortly after that Mr. Sparks was given permission to carry a weapon, a pistol?

A. I don't know, but I do know that the Captain, Captain Nabor——

Mr. Hudson: If the Court please——

The Court: Wait a minute. I think— What's your objection?

Mr. Hudson: I object to the answer to the question. He has stated, "I don't know". He has no personal knowledge of whether the man did or did not receive a permit.

The Court: I think the objection is good. On the basis of the answer, if he doesn't know he can't tell what he heard.

Mr. Heyer: He was about to say, "I do know that the Captain—".

Mr. Hudson: We don't want to have what counsel thinks it is going to be.

The Court: No. It couldn't be conversation. I don't know what it is, Mr. Heyer, but if the witness doesn't have firsthand knowledge he couldn't testify, and he could not testify to any conversation.

Mr. Heyer: All right. You may examine.

OBJECTION TO ADMISSION OF TESTIMONY OF HERMAN R. HUSKINS AND OVERRULING THEREOF

Mr. Hudson: If the Court please, I did not interpose an [fol. 42] objection at the time Sergeant Huskins was called relative to this conversation. I assume that the record can show the same objection to this testimony that we show to Captain Maybers.

The Court: It can show on the basis of Section 605 that you object to the testimony of this witness concerning this telephone conversation, and we also show that the objection is overruled.

Mr. Hudson: Yes, sir, and show my exception to both of them.

* * * * * * *

[fol. 53] FLOYD RATHBUN, the defendant herein, called as a witness in his own behalf, testified as follows:

Direct examination.

By Mr. Hudson:

* * * * * * *

[fol. 62] Q. Did you make any statement to Mr. Sparks in that fourth conversation or in any of the previous conversations that you would kill him?

A. I did not.

Q. Did Mr. Sparks advise you that there was anyone listening in on the conversation?

A. No, sir.

* * * * * * *

[fol. 112] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 114] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—May 23, 1956 (omitted in printing).

[fol. 115] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 5314—May Term, 1956

FLOYD LINN RATHBUN, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Thomas K. Hudson for Appellant;

John S. Pfeiffer, Ass't. United States Attorney (Donald E. Kelley, United States Attorney, was with him on the brief) for Appellee.

Before HUXMAN, MURRAH and PICKETT, United States Circuit Judges.

HUXMAN, Circuit Judge.

[fol. 116] OPINION—August 23, 1956

Appellant was tried and convicted in the United States District Court for the District of Colorado on a two count indictment charging him with violations of Title 18 U.S.

C.A. §875(b) and 875(c). Count one charged that appellant knowingly transmitted an interstate communication containing a threat with the intent to extort a thing of value. Count two charged him with knowingly transmitting in interstate commerce a communication containing a threat to injure the person of Everett Henry Sparks. Rathbun has appealed from a conviction and sentence on both counts.

Eight assignments of error are urged for reversal. They are: (1) The court erred in denying defendant's motion to dismiss count one of the indictment for a fatal variance between the indictment and proof; (2) the court erred in refusing to admit into evidence defendant's tendered exhibits A and B; (3) the court erred in admitting into evidence the Government's exhibit 2; (4) the court erred in failing to give witnesses excluded from the courtroom a cautionary instruction; (5) the court erred in refusing to allow the defendant to offer certain rebuttal testimony; (6) the court erred in charging the jury and in refusing to give a requested instruction; (7) the court erred in denying defendant's motion to strike the testimony of witness Huskins; and (8) the court erred in admitting the [fol. 117] testimony of witnesses Maybers and Huskins. We have given careful consideration to each of these assignments of error. It is our conclusion that only assignments of error No. 1 and No. 8 present questions which need to be discussed in detail. We conclude that the remaining assignments of error did not substantially affect appellant's rights.

The indictment charged that the thing of value attempted to be extorted was 100,000 shares of the stock of Western Oil Fields, Inc., whereas the testimony referred to a stock certificate for 120,000 shares of stock in that company and made no reference to 100,000 shares. The law is well established that only substantial variance between allegations and proof affects a defendant's rights and that immaterial variations will be disregarded. All that is required is that the indictment be so framed that the accused is definitely informed of the charges against him and can prepare his defense and not be taken by surprise by the evidence offered at the trial.[1] The gist of the offense was that defendant

[1] Berger v. United States, 295 U.S. 78, 82; Mathews v. United States, 15 F.2d 139; Keys v. United States, 126 F.2d 181.

sought to extort stock of Western Oil Fields, Inc., by means of threats sent over telephone lines. The variance [fol. 118] between the 100,000 shares alleged and the 120,000 shares of which proof was offered is wholly immaterial and in no way tended to prejudice the defendant in the preparation of the defense.

A more difficult problem arises with respect to the admission of the testimony of Robert L. Maybers and Herman R. Huskins who at the invitation of Sparks listened in on an extension phone to a telephone conversation he had with Rathbun and were permitted to testify to threats they heard Rathbun make against Sparks in that phone conversation. Rathbun and Sparks had been partners. Bitterness developed between them. Sparks had in his possession 120,000 shares of stock of Western Oil Fields, Inc. The difficulty out of which the alleged threats arose was that Rathbun, who was in New York to obtain a loan, apparently needed this stock as security and Sparks refused to release it. They had several telephone conversations preceding the one in question. It was arranged that Rathbun would call Sparks at his home in Pueblo, Colorado, from New York at 1:00 a.m. in the morning. Sparks arranged with the Pueblo Police Department for Officers Maybers and Huskins to come to his home and listen in on an extension phone. As stated, they were permitted to testify over objection by defendant to what they heard Rathbun say in this conversation.

[fol. 119] 47 U.S.C.A. §605 in pertinent part provides, ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . ." That is what is commonly known as the "Wire Tapping Statute." It is without dispute that one who intercepts a telephone conversation without the consent of the sender, while the conversation is being sent over the telephone wire, may not testify to such communication without the consent of the sender. So far there is no conflict in the decisions. The difficulty arises with what constitutes intereeption and who is a sender with respect to the question of consent.

Goldman v. United States, 316 U. S. 129, is one of the last cases in which this statute was considered by the

Supreme Court. While we do not think that it necessarily controls the disposition of the question presented to us because of a difference in the facts, it does lay down certain fundamental principles which are controlling. It makes it clear that only the sender of the message is protected and that his communication is immune from interception and subsequent publication based upon such interception only while it is being transmitted over the wire and before [fol. 120] it comes into the possession of the other party to the conversation. In the *Goldman* case the eavesdroppers had a delicate listening device attached to the wall of a room by means of which they could hear conversations between the parties in the room and also heard the words spoken by one of them into a telephone in a telephone conversation with a person at the other end of the line. What was specifically decided was that the words spoken into the telephone were heard the instant they were spoken and were therefore heard before they started their journey over the telephone line, and that there was therefore no interception of a message over the telephone line while in transit. We do not think it can seriously be contended that one who is in a room and hears words spoken into a telephone, or who is in an adjoining room and hears such words spoken even if by the aid of a mechanical device, is intercepting a message being sent over the wire.

There have been a goodly number of listening in on extension telephone cases before the lower courts and they are in sharp and irreconcilable conflict as to whether such listening without the consent of both parties constitutes a violation of the Act. Most of the courts have held that where officers with the consent of one of the parties have listened in on extension phones they may testify to what [fol. 121] they heard.[2] The Second Circuit, however, in two cases[3] has held to the contrary. No helpful purpose

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[2] United States v. Bookie, 229 F.2d 130; United States v. White, 228 F.2d 832; Flanders v. United States, 222 F.2d 163; United States v. Pierce, 124 F.Supp. 264; United States v. Sullivan, 116 F.Supp. 480; United States v. Guller, 101 F.Supp. 176; United States v. Lewis, 87 F.Supp. 970.

[3] United States v. Polakoff, 112 F.2d 888; Reitmeister v. Reitmeister, 162 F.2d 691.

would be served by analyzing all of these cases which have spoken on this question. *Flanders* v. *United States*, 222 F. 2d 163, is a well reasoned case and clearly shows the line of cleavage.

We agree with Judge Hand that both parties to a phone conversation are alternately senders and receivers. That question, however, is not material here because the conversation in question was initiated by Rathbun and it must be held that he was the sender and that what he said could not be intercepted in transit and thereafter testified to by the one intercepting it without his consent. We do not mean to say that violation of the "Wire Tapping Act" may not result from listening in on extension telephones. Whether such listening in constitutes a violation of the Act would depend on where the extension phone was attached. In the *Reitmeister* case, *supra*, the majority said: ". . . we cannot see why an existing lead off the main circuit was different from a 'tap' into the wire made ad hoc." It may be possible as far as we know to attach an extension [fol. 122] phone so that the message passing over it reaches the ear of the listener before it reaches the ear of the one carrying on the conversation and for whom it is intended. If such is possible, in such case it would constitute an interception. The mechanics of attaching extension phones and the manner in which the extension phone in question was attached are not established by the record. In view of that, we must take as the facts of this case the statement of the court upon which it predicated its ruling. The court said: "They both heard it simultaneously but there wasn't an interception before it reached the ears of the intended receiver of the conversation and the witness. It may have been simultaneous but there wasn't an interception between the lips of one and the ears of the other." No objection was made to that statement of fact. Under those facts, we think the *Goldman* case controls and that the court was correct in concluding that Rathbun's conversation was not intercepted by these two police officers before it reached the ears of Sparks.

Affirmed.

MURRAH, concurring specially.

As I read the *Goldman* case, the question of interception becomes a study in mechanics; and that "overhearing" an [fol. 123] interstate telephone conversation by means of a conventional extension receiver at the terminus of the message, is not an interception within the meaning of the statute.

[fol. 124] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Before HONORABLE WALTER A. HUXMAN, HONORABLE ALFRED P. MURRAH and HONORABLE JOHN C. PICKETT, Circuit Judges.

JUDGMENT—August 23rd, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Colorado and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment and sentence of the said district court in this cause be and the same is hereby affirmed.

It is further ordered by this court that Floyd Linn Rathbun, appellant, surrender himself to the custody of the United States Marshal for the District of Colorado, in execution of the judgment and sentence imposed upon him, within ten days from and after the date of the filing of the mandate of this court in said district court.

By order of August 30, 1956, the time for appellant's petition for rehearing was extended to September 15, 1956.

[fol. 125] Petition for Rehearing covering 6 pages filed September 14, 1956 omitted from this print. It was denied, and nothing more by order, October 1, 1956.

[fol. 131] IN UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ORDER DENYING APPELLANT'S PETITION FOR REHEARING—October 1, 1956

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

[By order of October 1, 1956, the mandate of the United States Court of Appeals was stayed for a period of thirty days from that day under provision of paragraph 3 of rule 28.]

[fol. 132] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 133] SUPREME COURT OF THE UNITED STATES

No. 538, October Term, 1956

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed January 14, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted limited to question 1 presented by the petition for the writ which reads as follows:

> "1. Is the listening in of third parties on an extension telephone in an adjoining room, without consent of the sender, an interception of a telephone message, and the divulgence of the contents of such conversation prohibited by statute, to-wit Sec. 605, Title 47, U.S. C.A."

The case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.